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WARE FRESSOLA VAN DER SLUYS &
ADOLPHSON, LLP
BRADFORD GREEN, BUILDING 5
755 MAIN STREET, P O BOX 224
MONROE, CT 06468

EXAMINER

TRAN LIEN, THUY

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/761,322
Filing Date: January 16, 2001
Appellant(s): GEHAN ET AL.

Thaddius Carvis
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 2/21/06 appealing from the Office action
mailed 12/02/03.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

224485	PERSSON	2-1959
6,312,743	BLASCHKE et al	11-2001

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5,534,281

PAPPAS et al

7-1996

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-3, 5-9 and 11-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Persson in view of Blaschke et al.

Persson discloses a sugar confectionery which has printed picture on the surface. The picture is covered with an opaque coating and the coating is licked off by the consumer to reveal the picture. The opaque coating can be chocolate, fondant coating, and opaque boiled sugar coating etc.. The picture is made on a wafer and the wafer and toffee may be shaped to resemble a television set and to make it apparent which is the side to be licked in order to disclose the picture. (see pages 1-4)

The Persson product and method differ from the claimed product and method in that the product is a sugar confectionery and not a cookie.

Blaschke et al disclose a ready-for-use cookie dough which is provided with score lines or grooves that define equally sized portions to be broken off and baked to form individual cookie. (see col. 1 lines 40-43)

It would have been obvious to change the substrate in Persson from a candy to a cookie to obtain a novelty cookie product. Candies and cookies are routinely consumed by children; thus, the playful idea of licking to reveal picture taught by Persson will be equally appealing to children when it is applied to a cookie product. It would have been obvious to apply the teaching of Persson to the Blaschke et al cookie to obtain novel cookie product that is appealing to children with its playful image revealing. It would also have been obvious to one skilled in the art to form a cookie from two cookie bases adhering to a layer of confection to form cookies having different flavor and taste; this type of sandwiching cookie is well known in the art. Confection cream containing fat and sugar is well known in the art as admitted by applicant in the specification. It would have been obvious to put a layer of confection over the picture as taught by Persson to form a hidden image to appeal to a sense of playfulness while eating to children. With respect to the image, the specification does not disclose and the claims do not set forth what will constitute a three dimensional image. Webster's Ninth New Collegiate Dictionary defines three dimensional as " giving the illusion of depth or varying distances – use of an image or a pictorial representation". The wafer in Persson is placed in the depression which is formed on the surface of the process; the depression

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gives the image an illusion of depth and the picture on the wafer is a pictorial representation. Therefore, by both definitions, the picture in Persson is a three-dimensional image and the image is on the base. Furthermore, it would have been obvious to one skilled in the art to form any type of image depending on the creative design wanted. It would also have been obvious to put any type of design on the cookie base; this would have been a matter of preference.

Claims 4 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Persson in view of Blaschke et al as applied to claims 1-3, 5-9 and 11-13 above, and further in view of Pappas et al.

Persson and Blaschke et al do not teach forming the picture by rotary molding.

Pappas et al teach to form designs on foods such as cookies, crackers and snacks using rotary molding. (see abstract)

It would have been obvious to one skilled in the art to use any known method to make the design on the cookie. It would have been obvious to use rotary molding as taught by Pappas et al to make the picture on cookie because they teach such method is used to make designs on cookie product.

(10) Response to Argument

On page 5 of the appeal brief, appellant argues the picture of Persson is a flat, two-dimensional printed picture, the process requires separate equipment for both cookie wafer forming and candy forming and the process includes six manipulative steps that the present invention does not and which cannot be accomplished on conventional cookie forming equipment. This argument is not persuasive. With respect

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to the image, the specification does not disclose and the claims do not set forth what will constitute a three dimensional image. A three dimensional image is generally know to have a perception of depth. The wafer in Persson is placed in the depression which is formed on the surface of the process; the depression gives the image an illusion of depth which is considered to be three dimensional. Appellant argues the picture is flat and covered with a uniform coating; the picture as shown in figures 1 and 3 is also flat. Appellant further argues the image of Persson cannot play an active role. It is not clear what appellant means by active role. Persson discloses "the coating is licked off and the picture will not be defaced as the child continues to lick the lollipop until the whole picture is disclosed". Thus, licking the coating reveals the picture; this is the same concept as the claimed product because the claims recite " a latent image that can be revealed by removing at least a portion the confection". With respect to the processing steps, the rejection is based on the premise that it would have been obvious to apply the image to a cookie product and then to cover it with a coating so that the picture is revealed as the coating is eaten. It would have been readily apparent to one skilled in the art that if the base is a cookie, different processing steps would be required to form the cookie base as opposed to candy base. But the processing steps of applying a printed picture to the base using a wafer sheet and to cover the picture with a coating would be adapted to a cookie base instead of a candy base. Appellant has not submitted any evidence to show that the wafer picture and the coating cannot be formed on a cookie base. The wafer sheet is formed of cereal which is an ingredient that is used on cookie product; thus, the sheet is totally compatible for use with a cookie

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product. Cookies are commonly coated with coating such as chocolate, cream; thus, the coating of the cookies as taught in Persson is not contraindicated. A 103 rejection must also take into consideration the skill of one in the art; if a cookie base is used, it would have been obvious to one skilled in the art to use processing equipment that is suitable for cookie and not the candy forming system Appellant argues the conversion of the Persson product to all cookie would fully change the nature and construction of the product. It is true that such conversion fully changes the product because cookie is different from candy; but, the concept of revealing the picture by eating the coating does not change. The question to be answered is would such conversion have been obvious to one skilled in the art. It is the examiner's position that such conversion would have been obvious to one skilled in the art when one wants to make a cookie product with playful feature that is intended to appeal to children. Even if the reference is not directed to cookie, the concept taught by Persson is applicable to cookie product and if the base is a cookie, it would have been within the skill of one in the art to use suitable equipment and process to make a cookie and then use the picture and coating taught by Persson. The claims do not recite any specific steps of how the cookie is formed; thus, the issue regarding the forming of cookie base does not need to be considered.

On page 8 of the appeal brief, appellant argues the rejection is based on impermissible hindsight. The examiner respectfully disagrees with appellant. Cookies come in many different shapes, designs, flavor, etc... One only needs to look in a cookie cookbook for kids or cookie cookbook to see this. For example, there are cookies that shape as turtle, dinosaur, fish; there are cookies that have candy on the

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surface or candy hidden in the dough; there are cookies that have treat covered under a coating of chocolate etc... Thus, having the teaching of Persson and Blaschke et al in view of the known fact of different designs, structure, flavor, etc... for cookie, it would have been obvious to one skilled in the art to incorporate the teaching of Persson in making the cookie to make an appealing cookie to appeal to the playful nature of the consumers most commonly consume the product.

With respect to claims 4 and 10, appellant makes the same argument as above; the argument is not persuasive as set forth above.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


Lien Tran



LIEN TRAN
PRIMARY EXAMINER
Group 1700

Conferees:

Glen Caldarola

Milton Cano


MILTON F. CANO
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 1700


Glenn Caldarola
Supervisory Patent Examiner
Technology Center 1700